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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MICHAEL PENNEL, JR.,
Plaintiff,

vs.

Case No. 5:16cv02889
Akron, Ohio
Wednesday, November 30, 2016

NATIONAL FOOTBALL LEAGUE
PLAYERS ASSOCIATION, ET AL.,
Defendants.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN R. ADAMS
UNITED STATES DISTRICT JUDGE

TELEPHONE CONFERENCE

APPEARANCES:

For the Plaintiff: Stephen S. Zashin
Patrick J. Hoban
Zashin & Rich - Cleveland
4th Floor
950 Main Avenue
Cleveland, Ohio 44113
(216) 696-4441

For Defendant National
Football League Players
Association: David L. Greenspan
Winston & Strawn - New York
200 Park Avenue
New York, NY 10166
212-294-4616

LORI A. CALLAHAN, RMR, CRR (330) 252-6022

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Thomas D. Warren
Baker & Hostetler - Cleveland
2000 Key Tower
127 Public Square
Cleveland, Ohio 44114
(216) 621-0200

For Defendant National
Football League and
National Football League
Management Council:

Philip M. Oliss
Squire Patton Boggs
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114
(216) 479-8448

Daniel L. Nash
Stacey Recht Eisenstein
Akin Gump
Robert S. Strauss Building
1333 New Hampshire Avenue, NW
Washington, DC 20036-1564
(202) 887-4000

Court Reporter:

Lori Ann Callahan, RMR-CRR
United States District Courthouse
Room 568
2 South Main Street
Akron, Ohio 44308
(330) 819-8676

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1 P R O C E E D I N G S

2 - - -

3 THE COURT: All right. Counsel, this is Judge
4 Adams. Can you all hear me?

14:15:01 5 For the record -- we will conduct this on the
6 record. For the record, the court has before it today Case
7 Number 5:16cv2889. The case is captioned Michael Pennel,
8 Jr., versus the National Football League Players
9 Association, the National Football League and the National
14:15:17 10 Football League Management Council.

11 We're here today for a conference to discuss an
12 outstanding motion for a temporary restraining order, as
13 well as a preliminary and permanent injunction, which is
14 sought by the plaintiff in this matter.

14:15:30 15 Before we go further, I would ask counsel to
16 identify yourselves and who's appearing for the record as we
17 are conducting this conference by telephone, and I would ask
18 when you are called upon to speak, that you identify
19 yourself before speaking for the benefit of the court
14:15:47 20 reporter.

21 Counsel, on behalf of Mr. Pennel.

22 MR. ZASHIN: Thank you, Your Honor. On behalf of
23 Mike Pennel, Stephen Zashin and Pat Hoban from Zashin &
24 Rich.

14:16:00 25 THE COURT: Thank you. On behalf of the National

1 Football League Players Association?

2 MR. WARREN: Yes, Your Honor. Tom Warren from
3 Baker & Hostetler and David Greenspan from Winston & Strawn.

4 THE COURT: And the National Football League?

14:16:15 5 MR. OLISS: Good afternoon, Your Honor. This is
6 Philip Oliss from Squire Patton Boggs and with me is Dan
7 Nash and Stacey Eisenstein from Akin Gump.

8 THE COURT: On behalf of the Football League
9 Management Council?

14:16:31 10 MR. OLISS: Your Honor, Phil Oliss, again, the
11 same.

12 THE COURT: All right. Thank you. I have read
13 the pleadings filed on behalf of the plaintiff. I have not
14 had considerable amount of time to read the position
14:16:43 15 statements filed by the defendants which were submitted here
16 a matter of minutes ago. So I don't have a -- haven't
17 thoroughly reviewed them, but I have some general idea as to
18 the ideas.

19 Counsel for Mr. Pennel, why don't you give me an
14:16:58 20 overview of your client's claims and the basis of your
21 request here for the TRO? That's really the most pressing
22 matter at this time.

23 MR. ZASHIN: Thank you, Your Honor. On behalf of
24 Mr. Pennel, he has filed this action in this court seeking a
14:17:15 25 temporary restraining order, a preliminary and permanent

1 injunction, and a motion that the court designate and
2 appoint an arbitrator, and a request for the declaratory
3 judgment.

4 And in sum and substance, what Mr. Pennel has
14:17:27 5 claimed is that there has been a lapse relative to the
6 collectively bargained policy concerning the appointment of
7 an arbitrator in this particular hearing or grievance appeal
8 relative to a potential suspension of him from the National
9 Football League for one year for which he was actually
14:17:49 10 subjected to discipline.

11 As part of that, the court should know that we
12 were supplied with the -- what was represented as the
13 collectively bargained policy, the policy on substances of
14 abuse. That policy makes it very clear that there are
14:18:07 15 supposed to be a minimum of three and a maximum of five
16 arbitrators that are -- pursuant to policy to hear appeals
17 on behalf of players.

18 Like you, Your Honor, I have not had extensive --
19 an extensive opportunity to read the position papers that
14:18:24 20 were submitted by both the NFL and the NFL Players
21 Association; however, each of them has represented what we
22 received as part of an index binder, which is a part of the
23 actual policy itself, is not actually the real terms of the
24 collective bargaining agreement between the parties.

14:18:43 25 That, in fact, there were side agreements or side

1 deals that were apparently agreed upon but never provided to
2 any of the players in this particular case, and as part of
3 the discovery that we issued, we specifically asked for
4 information relative to those side deals, and we were denied
14:19:03 5 access to that information.

6 What we now know, however, by virtue of the
7 position papers filed by the NFL and the NFL Players
8 Association is that there was potentially a modification
9 through the collective bargaining agreement concerning the
14:19:16 10 use of three arbitrators; however, there are a couple of
11 problems with that.

12 Number one, there was a predecessor policy, a 2015
13 substance of a -- substances of abuse policy. That policy
14 like the 2016 policy also required a minimum of three and a
14:19:34 15 maximum of five arbitrators. At some time, we believe in
16 late August of 2016, the policy was amended or potentially
17 was amended.

18 Like the 2016 policy, it also contained the
19 requirement of three arbitrators and a minimum of three and
14:19:56 20 a maximum of five. There were, according to the NFL,
21 however, there were other modifications to the substances of
22 abuse policy, which deal directly with the issues concerning
23 Mr. Pennel that are specifically identified in the policy.
24 However, there was no modification relative to the panel of
14:20:16 25 arbitrators as set forth in the 2015 policy or in the 2016

1 policy.

2 Now, the NFL, nor the NFLPA, has provided us any
3 information when the supposed agreement was made relative to
4 the appointment of only two arbitrator; however, there are
14:20:33 5 problems with their assertion.

6 First and foremost is on page 1 of the 2016
7 policy, there is an integration clause and; therefore, if
8 there was any modification to the policy that occurred in
9 2015 or before the implementation of the 2016 policy, that
14:20:55 10 has been specifically superseded by the terms of the 2016
11 policy.

12 And I quote on page 1 of the substances of abuse
13 policy, "This policy supersedes all previous policies and
14 shall continue until the expiration or termination of the
14:21:13 15 collective bargaining agreement." That's what it says in
16 the agreement itself.

17 Secondly, the union's constitution requires
18 that any modification must be agreed to by the union's
19 executive board or a vote by the membership. Upon
14:21:30 20 information and belief, Your Honor, that has never occurred,
21 and even -- and, therefore, even if there was such a
22 modification made after the implementation of this new
23 version of the policy, it does not actually cover the
24 dispute.

14:21:43 25 And finally, because the NFL, as required by the

1 policy, provide us with only the policy that indicates that
2 there is a minimum three and a maximum of five arbitrators,
3 that is the policy that controls Mr. Pennel's arbitration in
4 this particular case.

14:22:02 5 THE COURT: Sir --

6 MR. ZASHIN: I think it's also important to
7 understand, and as the NFL Players Association has conceded,
8 is that there is irreparable harm in this case, because if
9 Mr. Pennel is suspended by the NFL, NFL players' careers are
14:22:20 10 by definition short.

11 The commissioner of the NFL had specifically
12 stated that the average player's career is six years. The
13 NFL Players Association has said that the actual average is
14 only 3.3 years or thereabouts.

14:22:36 15 The implementation of discipline relative to this
16 particular case is tantamount to a suspension of Mr. Pennel
17 or either by the NFL's way of thinking, 17 percent of his
18 career or by the NFL Players Association, of a third of his
19 career or thereabouts.

14:22:56 20 So as it relates to the irreparable harm, all Mr.
21 Pennel is asking for in connection with this proceeding is
22 that the court adopt and appoint a neutral arbitrator to
23 hear his appeal prior to the arbitration itself.

24 Now, I would also point out, in connection with
14:23:15 25 their briefing -- and by the way, I wish to point out that

1 neither the NFL or the NFL Players Association have
2 addressed our claim under the Declaratory Judgment Act.

3 The NFL says that the Section 301 case is
4 premature, but by very definition, in light of the
14:23:33 5 conspiracy between the NFL Players Association and the NFL,
6 one of the ways that 301 action can lie is if there is
7 futility, and it is apparent by virtue of the NFL Players
8 Association's conduct in this matter that any complaint that
9 Mr. Pennel has had have fallen on complete deaf ears. And
14:23:53 10 in that regard, Mr. Pennel has made two requests for
11 information to the Players Association.

12 Other than providing Mr. Pennel with letters from
13 the administrator under the policy, the NFL Players
14 Association has refused in virtual totality to provide Mr.
14:24:11 15 Pennel with any information relative to his defense in this
16 particular proceeding.

17 The only other point I wish to make, Your Honor,
18 is that in this case, as it relates to their argument that
19 our motion for temporary restraining order is premature, I
14:24:31 20 would point the court's attention to Brook versus Peak
21 International, 294 F.3d 668. It's a Fifth Circuit case that
22 says, "The failure to raise an objection to a defect in the
23 arbitration selection process at the outset of the
24 proceedings constitutes a waiver of the right to do so."

14:24:48 25 And, therefore, this is not premature. Instead,

1 it is required under Section 5 of the Federal Arbitration
2 Act. Thank you.

3 THE COURT: Sir, would you just -- for the benefit
4 of the court reporter, who is speaking, please?

14:25:06 5 MR. ZASHIN: That was Steve Zashin, I apologize.

6 THE COURT: Thank you.

7 Counsel, let's go down in the line in terms of the
8 individuals who are -- go through the parties as they're
9 named in the complaint.

14:25:17 10 The National Football League Players Association,
11 what's your position, please?

12 MR. GREENSPAN: Good afternoon, Your Honor.

13 Again, this is David Greenspan from Winston and Strawn.

14 Your Honor, we believe that this complaint should
14:25:30 15 be dismissed as a matter of law. We understand that Your
16 Honor and the plaintiff has not had a chance to look at our
17 position papers and study it just yet. What we outline is
18 that the very relief that the plaintiff is requesting
19 violates the NFL and NFL collective bargaining agreement.
14:25:50 20 It violates the arbitration provision. It violates federal
21 labor law.

22 Plaintiff represents that he is merely asking the
23 court to maintain the status quo is absolutely inaccurate.
24 Plaintiff is asking the court to recreate the status quo,
14:26:07 25 appoint an arbitrator on its own, an arbitrator that is not

1 selected by the NFL and the NFLPA as the agreement provides.

2 Plaintiff is asking the court to require that
3 arbitrator to hear the proceedings as opposed to the notice
4 arbitrator, which is what the collective bargaining
14:26:26 5 agreement provides.

6 THE COURT: Can I interrupt for a moment, sir?

7 I know what he's asking me to do, with all due
8 respect. I am just a bit curious about whether or not the
9 Players Association and the NFL are in full compliance with
14:26:40 10 the terms of the policy?

11 The points that he raises with regard to the
12 arbitration provision and the allegation that there is some
13 sort of side deal here, can you respond to that?

14 I am more interested in specifically, again, how
14:26:57 15 you would respond to the substance of his arguments. I know
16 what he's asking for is extraordinary, but I am more curious
17 about whether or not you have fully complied with both the
18 Players Association and the NFL with exactly what the terms
19 of the policy are.

14:27:14 20 MR. GREENSPAN: Okay. So, Your Honor, let me try
21 to answer that as best I can. You are familiar with our
22 position on the relief, as well as the fact that the case is
23 premature. The plaintiff has not exhausted his arbitration
24 and NFLPA and CBA procedures.

14:27:32 25 With respect to what they characterize as a lapse

1 in the policy, there is no lapse in the policy. There is a
2 jointly appointed neutral arbitrator who is available on the
3 hearing date, which is automatically scheduled pursuant to
4 the CBA procedure. That arbitrator, Mr. Carter, was
14:27:52 5 actually scheduled to cover the December 6 hearing date as
6 far back as May 2016 of this year. There is, in fact, a
7 notice arbitrator, that is Mr. Wong. Mr. Wong, in
8 consultation with Mr. Carter, as the CBA requires, made sure
9 that one of them would cover every Tuesday during the NFL
14:28:16 10 season, and that was set sometime ago. It just so happens
11 that Mr. Pennel's hearing falls on a date that Mr. Carter is
12 supposed to cover.

13 In terms of the fact that there are two, and not
14 three or more arbitrators, that is correct. It is my
14:28:31 15 understanding that one or two years ago, I'm not sure
16 exactly when, the parties, by mutual consent -- and I would
17 point out that in the policy, Section 1.18 modification
18 merely requires mutual consent of the parties. The parties
19 determined that two arbitrators were sufficient to do the
14:28:55 20 work of hearing these drug policy appeals for a very simple
21 reason.

22 There are not many of these drug policy appeals,
23 and the parties concluded that it did not make sense to
24 employ a third arbitrator to spread out the limited number
14:29:10 25 of appeals between three arbitrators and instead, there are

1 two arbitrators. They are neutrals who hear these appeals
2 and have great familiarity with the issues because they hear
3 more of the limited number of appeals that have been filed.

14:29:26 4 THE COURT: Was the modification reduced to
5 writing?

6 MR. GREENSPAN: I don't know, Your Honor. I have
7 not seen --

8 THE COURT: It's not been reduced to writing? Was
9 it submitted to the union's leadership for their -- I assume
14:29:37 10 the union itself has some sort of committee or a membership
11 might have a voice in this, this modification, given the
12 stakes at issue here for players?

13 MR. GREENSPAN: Your Honor, I don't know the
14 answer, in terms of the internal union logistics. The union
14:29:59 15 has a board of player representatives. It's sort of
16 equivalent to the board of directors of the union. I do not
17 know whether this issue was raised to them. I can only tell
18 Your Honor that this status quo has existed both under the
19 drug policy and the performance enhancing drug policy for a
14:30:22 20 couple of years.

21 There have been plenty of appeals. No player has
22 ever raised this issue, but to the extent it hasn't reached
23 the board -- the board of player representatives, it's
24 because none of its membership ever expressed any concern.

14:30:38 25 In fact, Mr. Zashin represents a client who was

1 subject to the performance enhancing drug policy and went
2 through these very procedures just one month ago and they
3 were fully aware there were two arbitrators and not three.

4 As far as I know, Your Honor, no objection was
14:30:54 5 raised. I believe the reason we're here today is because
6 the arbitrator, who denied the appeal that Mr. Zashin was
7 involved in several weeks ago, has effectively been randomly
8 assigned to cover the appeal upcoming on December 6.

9 There is no allegation that this arbitrator, who
14:31:13 10 is a world renowned arbitrator, who has expertise in this
11 matter is biased, is in any way not going to hold a
12 fundamentally fair hearing. It appears that Mr. Zashin,
13 unhappy with the results in his prior proceedings before
14 that arbitrator, has now come into court despite working
14:31:36 15 through and living with those procedures a month ago, to now
16 ask for the extraordinary remedy of having the court appoint
17 an arbitrator, of having the court determine which
18 arbitrator would preside over that hearing.

19 THE COURT: I don't need to go there in terms of a
14:31:55 20 remedy. I don't want to get into the remedy issue yet. I
21 don't think I need to go there and decide whether or not I
22 am going to appoint an arbitrator, an independent arbitrator
23 myself.

24 But I am a bit concerned about this process that
14:32:15 25 you apparently have adopted that strikes me as inconsistent

1 or contrary -- or a modification of what is clearly set
2 forth in the agreement between the NFL and the Players
3 Association, and how you would go about doing that without
4 some formalities, something in writing or something of that
14:32:38 5 effect, because, again, I think it's relatively clear,
6 there's certainly good argument that the implications for a
7 player, a suspension and the right to a fair hearing would
8 certainly caution the appropriate, again, formalities be
9 filed.

14:33:01 10 So I am a bit concerned about whether or not this,
11 again, this, if you want to call it a gentleman's agreement,
12 that no one has been able to tell me has been formalized,
13 agreed to in a formal fashion pursuant to the union's, I
14 assume, bylaws and what have you. The player certainly is
14:33:22 15 free to raise it. He may not have raised it before. Others
16 may not have raised it. They may not have been aware of it.

17 So I am troubled by that.

18 MR. GREENSPAN: So, Your Honor, I guess the first
19 thing I would say is in terms of following the required
14:33:38 20 formalities, I don't agree with plaintiff's premise that
21 they were not followed. When I looked at the policy last
22 night, what I found was a provision that says that
23 "Modification of the policy will require the mutual consent
24 of the parties."

14:33:56 25 Provisions like that usually specify writing. The

1 words "writing, written" or something to that effect does
2 not appear in that provision. There's mutual consent of the
3 parties here.

4 In terms of Mr. Zashin's reference to the NFLPA
14:34:13 5 constitution, frankly, Your Honor, I'm not sure what
6 provision he's referring to. I have no idea if it's
7 applicable. But even if we take a step back from that, Your
8 Honor, and let's assume that the parties had not represented
9 in their position papers that there has been a modification
14:34:31 10 to the policy such that they've agreed that two arbitrators
11 is sufficient instead of three. Let's assume he hadn't even
12 taken that position, Your Honor. I am still at a loss as to
13 what is the difference here. That was to me what was most
14 striking about plaintiff's submission.

14:34:48 15 There is no allegation -- it would be a very
16 different situation, Your Honor, if the parties had two
17 arbitrators instead of three and as a consequence, there was
18 not an arbitrator available to timely hear Mr. Pennel's
19 appeal. That's not the case.

14:35:08 20 It would be a different situation if we had no
21 arbitrators whatsoever, or we only had one arbitrator and
22 the arbitrator was not qualified, but none of those
23 circumstances are present. Not one complaint has been
24 raised about Mr. Wong or Mr. Carter, who are the arbitrators
14:35:27 25 who have served in this capacity for a couple of years now,

1 I believe.

2 And so even if and, Your Honor, I am saying -- I
3 am making this point for the sake of argument. I'm not
4 accepting the premise. Even if there was technical
14:35:41 5 noncompliance with two arbitrators versus three, I fail to
6 see any injury whatsoever that's been identified or would
7 flow from that, much less to justify in an equitable matter
8 the extraordinary request that has been made here.

9 THE COURT: What I would be inclined to do if I
14:36:00 10 found in favor of the plaintiff would be simply to issue a
11 TRO until such time we could have some discovery and a full
12 hearing on the matter.

13 The policy itself states clearly, at page 1, "This
14 policy supersedes all previous policies and shall continue
14:36:16 15 until the expiration or termination of the CBA."

16 And then it goes on -- and the provision that the
17 plaintiff is citing me to that, apparently there's no
18 dispute, hasn't been followed. It says, "The parties shall
19 jointly," not may, it says, "shall jointly select and be
14:36:34 20 equally responsible for compensating no fewer than three but
21 not more than five arbitrators to act as hearing officers
22 for appeals, under Section 1.5 of the policy," and then it
23 goes on.

24 And it appears there's no dispute that you haven't
14:36:47 25 followed or complied with that provision, and there's an

1 argument that, "Well, we've modified," but there's no
2 writing. There's no evidence of the modification or
3 approval by the union, or more to the point, the approval of
4 the players or their representatives, who are subject to
14:37:03 5 this policy.

6 You may argue that, "Well, there's no harm done,
7 because we have two arbitrators," but certainly would be
8 entitled to the three to five and a notice arbitrator.

9 So I'm not deciding anything today, but I am
14:37:19 10 giving you notice that we're going to need to have a hearing
11 and some of these issues are sort of front and center.

12 You know, I would think that the anchor here is
13 the writing between the parties and we should look to that,
14 and I would think under these circumstances, given the
14:37:33 15 possible consequences to the player or players, that one
16 would think that strict compliance with the policy would be
17 something that we would be seeking.

18 So, you know, again, this player, as I understand
19 it, has some prior discipline, correct me if I am wrong,
14:37:51 20 somewhere I seem to note, I am not sure where I learned it,
21 he may be subject to a one-year suspension if this is
22 upheld? Is that correct.

23 MR. ZASHIN: Your Honor, this is Steve Zashin on
24 behalf Mr. Pennel, that is correct.

14:38:03 25 THE COURT: So, you know, there's an extraordinary

1 harm here to his career and/or his ability to make a living.

2 So I am taking the matter seriously. I'm not
3 going to decide it today, but, you know, it is interesting,
4 shall we say, that, again, given the stakes, that we would
14:38:24 5 have some side agreement that we don't have in writing and
6 we don't know any details about it.

7 So in any event --

8 MR. NASH: Your Honor, this is Dan Nash on behalf
9 of the NFL Management Council.

14:38:40 10 THE COURT: We're going to go down the line. I'm
11 sorry, sir. We will go next in line, sir. Just a moment.
12 Let me make sure we're doing this in the order in which the
13 complaint -- the parties are named.

14 So the National Football League and the National
14:38:54 15 Football League Management Council, we will go to the league
16 since there is a consolidation here. Go ahead.

17 What would you like to tell me?

18 MR. NASH: This is Dan Nash. Let me first address
19 your -- the question that you're wrestling with, Your Honor,
14:39:09 20 and it's a question of how to interpret the NFL collective
21 bargaining agreement with the Players Association, Mr.
22 Pennel's union.

23 It's a question -- by the way, the Players
24 Association and the Management Council are subject to a
14:39:23 25 broader collective bargaining agreement, not just the policy

1 on substances of abuse that the plaintiffs are focused on
2 here.

3 But the arguments that you're hearing about how to
4 interpret that policy, in a matter like this is a classic --
14:39:40 5 I would submit it's a classic dispute over the meaning of a
6 collective bargaining agreement. It is black letter labor
7 law that disputes like that must be resolved in the first
8 instance through arbitration.

9 An employee like Mr. Pennel simply may not jump
14:40:02 10 past arbitration and go to court and seek to have either
11 discovery or any sort of fact finding or any sort of ruling
12 on the meaning of a collective bargaining agreement, without
13 at least first pursuing arbitration under the applicable
14 agreement.

14:40:20 15 And there's no dispute here, Your Honor, that Mr.
16 Pennel has not done that.

17 Now, counsel said at the end of his presentation
18 on behalf of Mr. Pennel, he relied on a Fifth Circuit case
19 named Brook, and he said that there's some waiver if you
14:40:36 20 don't raise these arguments at the outset of the proceeding
21 and to suggest that that's what he's doing here.

22 He's not. We are not at the outset of this
23 proceeding. We are in the middle of this proceeding. The
24 arbitration, Your Honor, is scheduled for next Tuesday. The
14:40:53 25 parties have been preparing for that arbitration. Counsel

1 for Mr. Pennel, as I think he referenced, has submitted
2 discovery requests. He apparently is not satisfied with the
3 responses to those discovery requests and instead of raising
4 those concerns to the arbitrator, as he is bound by the
14:41:13 5 policy and by fundamental labor law to do, he comes to court
6 and he's asked the court to enjoin that proceeding.

7 Your Honor, that type of request is not only
8 flatly inconsistent with the Federal Arbitration Act, which
9 he relies on, it is fundamentally at odds with well settled
14:41:37 10 labor law, and if there's any doubt about that, Your Honor,
11 the Sixth Circuit answered this question just two years ago.

12 We cited it in the paper that we submitted to you
13 this morning, but it's a case called Savers Property and
14 Casualty Insurance Company. It's reported at 748 F.3d 708,
14:41:57 15 and at page 716 of that decision, Your Honor, the Sixth
16 Circuit makes very clear, and I will quote, "Parties to an
17 arbitration generally may not challenge the fairness of the
18 proceedings or the partiality of the arbitrators until the
19 conclusion of arbitration and the rendition of a final
14:42:15 20 award. Because the plaintiff's arbitration proceeding was
21 ongoing and because the arbitrator had not issued a final
22 award, the district court erred by prematurely injecting
23 itself into this private dispute."

24 Your Honor, I would submit that the arguments that
14:42:31 25 are being made here, the very filing that plaintiffs have

1 done here, is foreclosed by this case. It is foreclosed by
2 the expressed terms of the Federal Arbitration Act and the
3 Labor and Management Relations Act, which is really the only
4 basis that this court could have jurisdiction over this
14:42:47 5 dispute.

6 It's a labor dispute. And you simply cannot come
7 in and sue and seek to enjoin an ongoing arbitration. If
8 there is any merit, and we would submit -- I'm not
9 addressing -- by the way, I should say, I don't agree that
14:43:03 10 there's a modification. I think if we were in the proper
11 forum, frankly, if we were before an arbitrator, and, in
12 fact, there have been arguments that have been made by
13 counsel for Mr. Pennel in another case about these various
14 provisions.

14:43:18 15 And if we were addressing this to the arbitrator,
16 which is where it should be addressed, what I would say is
17 that the purpose of the provision that they're relying on,
18 the very purpose of the provision that there will be a pool
19 of three to five arbitrators is simply to insure that these
14:43:38 20 disciplinary appeals are not dragged out, that they are
21 heard expeditiously, that there is going to be an arbitrator
22 available. That's the whole point of it.

23 If we were litigating that issue, Your Honor, over
24 the meaning of the policy provision that you focused on, and
14:43:56 25 I understand why, we would show that there's been no

1 violation of that provision here. It's simply -- the point
2 of that provision is to make sure that we have sufficient
3 arbitrators to hear these appeals.

4 In fact, what they're doing here runs directly
14:44:14 5 counter to the provision that they base their entire claim
6 on. They want you to enjoin the arbitration. They want to
7 have a lengthy federal court proceeding and, Your Honor,
8 what would be the result of that? The result of that would
9 be that they would be successful in frustrating our
14:44:32 10 collective bargaining agreement. They would be successful
11 in the improperly using the federal court to interfere with
12 what the -- what the Management Council and Mr. Pennel's own
13 union have agreed is that it's very important that these
14 appeals be resolved expeditiously so we have people
14:44:55 15 available every Tuesday. If he's available next Tuesday,
16 it's been assigned, and what they would be doing is
17 absolutely frustrating that --

18 THE COURT: With all due respect, let me ask you a
19 question.

14:45:06 20 What is the player to do in this case? What is
21 the plaintiff to do if, in fact, hypothetically management
22 and his union have chosen to either ignore or unilaterally
23 decide not to abide by a provision in their agreement,
24 because that's the argument they're making.

14:45:28 25 They're saying, "Judge, here's why we're here is

1 because management and the union have agreed they will not
2 follow the specific provisions set forth in this policy, and
3 they have told us that they have modified or agreed to a
4 modification which we have not yet seen, which is not" -- at
14:45:50 5 least no one has told me is in writing. No one has told me
6 there's been -- "The proper protocol has been followed in
7 getting the approval of the modification. So, therefore,
8 Judge, where else can we go besides a federal court," if, in
9 fact, the parties, again, hypothetically, their argument is
14:46:07 10 that you have, you and the union, have chosen to modify this
11 agreement in some fashion?

12 If that's the case, then, again, where else are
13 they going to go, and what other modifications may have been
14 agreed to between the union and management that the players
14:46:26 15 are either unaware of or hasn't been -- protocol hasn't been
16 followed?

17 So, you know, isn't that sort of a slippery slope?

18 MR. NASH: Your Honor, with respect, no. The
19 answer -- and I can give this to you as someone who's been
14:46:41 20 practicing labor law for a very long time. It's very clear
21 that an employee in this situation goes to the dispute
22 resolution procedures under the collective bargaining
23 agreement. They go to the arbitrator. He's free to make
24 this argument to the arbitrator, and, again, what we're
14:47:00 25 talking about is a dispute over how to interpret the

1 collective bargaining agreement.

2 Your Honor, it could not be clearer that those
3 kinds of disputes cannot be brought in the first instance in
4 federal court. It is simply not permissible.

14:47:15 5 Now -- if he loses, and if there's any merit to
6 any of these arguments, and as I said, the Sixth Circuit
7 decision in Savers makes it perfectly clear. He absolutely
8 cannot go. And if there's anything that's clear, he cannot
9 go in the middle of the arbitration to federal court and ask
14:47:34 10 for the court to interfere with that process.

11 He can make arguments to the arbitrator. The
12 arbitrator will issue an award. He's free to then to seek
13 to vacate the award saying -- come to federal court at that
14 point. We would obviously oppose and say there's no merit
14:47:50 15 to it, but that would be -- this could not be clearer, Your
16 Honor, as a matter of fundamental labor law.

17 And just to keep in mind the irreparable harm
18 point. He's not under suspension right now. One of the
19 reasons why the Management Council and the Players
14:48:06 20 Association have agreed to do this expeditiously is because
21 they've also agreed that while this appeal process is going
22 on before the arbitrator, the player keeps playing. So Mr.
23 Pennel is playing. He doesn't need your help today to do
24 anything. He's playing.

14:48:21 25 And the arguments he is making are arguments that

1 he can make -- he should be required to go through his
2 arbitration proceeding. If he is dissatisfied after the
3 award is issued, that is the point where he can make -- try
4 to make some of these arguments. They would be meritless, I
14:48:38 5 can tell you that, because, again, as Mr. Greenspan said on
6 behalf Mr. Pennel's union, there is no harm.

7 Let's be -- let's really just be practical for a
8 moment and just be very clear about what we're talking about
9 here.

14:48:53 10 There seems to be this suggestion from Mr.
11 Pennel's counsel that he's entitled to have three
12 arbitrators hear his case instead of two. No, no. He's
13 entitled to have one arbitrator to hear his case. He does
14 have one arbitrator who's neutral, and by the way, who's an
14:49:10 15 expert as agreed to by the players union and the league to
16 hear his case and he's available.

17 And the fact that at the beginning of the season,
18 whether the league and the union decided, "Well, we will
19 have three to make sure we make every Tuesday covered," that
14:49:26 20 is of no moment to his appeal. He is -- he has every right
21 to have what he's entitled to under the collective
22 bargaining agreement. This is a much of a red hearing as
23 you could possibly come up with.

24 Again, the irreparable harm is not -- it's
14:49:41 25 suspension. He's not suspended right now. And so any

1 action -- and I say this, Your Honor, because I hear what
2 you're saying, and I understand you have these questions and
3 they're perfectly understandable. But what I can say is
4 discovery, further court proceeding, this is exactly what
14:50:04 5 the courts are not supposed to do. He is free to -- he
6 should be required to go forward with his arbitration.
7 These arguments can be made at a later date once the
8 arbitrator issues his award.

9 THE COURT: All right. Anyone else wish to be
14:50:20 10 heard?

11 MR. ZASHIN: Your Honor, just briefly. This is
12 Steve Zashin on behalf of Mr. Pennel.

13 The only points I would make are a few. The first
14 issue I would make relates to this issue concerning whether
14:50:33 15 or not it's for the arbitrator to decide this issue or for
16 the court. And the Sixth Circuit has held in Elsevier
17 versus Crockett, which is a Sixth Circuit decision, that
18 where the arbitration agreement is silent, the gateway issue
19 is to be decided by the court.

14:50:49 20 And that was also held the same in the Opalinski
21 case of the Third Circuit with this exact issue. The
22 question is much akin to where you have an arbitration
23 agreement considering class wide arbitration. The courts
24 have all determined that in those particular instances, that
14:51:09 25 the court must decide the gateway issue before the case can

1 actually proceed to arbitration and, therefore, the cases
2 cite by -- by the NFL, by Mr. Nash, are not applicable.

3 The cases that he was dealing dealt with the
4 vacation of an award in the case involving Savers Property
14:51:32 5 and Casualty he cited earlier.

6 The only other issue I wanted to mention is his
7 concept of what is the outset of these proceedings. Mr.
8 Pennel was never provided with information relative to the
9 arbitrator selection. In fact, he has never received any
14:51:45 10 indication from the arbitrator himself that he will preside
11 over this case.

12 We are at the inception of these proceedings.
13 This is a very short timeframe, and that is why we requested
14 injunctive relief in this case, because we believe that we
14:51:59 15 need discovery relative to -- if there even is an agreement
16 about this only having two arbitrators, and, therefore, it
17 is his position that this is a gateway threshold issue for
18 the court to ferret out, we're at least entitled to
19 discovery about that particular issue.

14:52:15 20 THE COURT: All right.

21 MR. NASH: Your Honor, this is Dan Nash, if I may
22 respond.

23 THE COURT: Yes, sir. Go ahead.

24 MR. NASH: What you just heard is flatly wrong.

14:52:25 25 First of all, this is -- they commenced this arbitration

1 proceeding. We're not at the outset. They filed an appeal.
2 They've submitted discovery requests. We are in the middle
3 of the arbitration. As far as the cases that he is citing
4 to you about the court deciding at the outset of the
14:52:44 5 proceedings, those are cases where there's a dispute over
6 whether a particular issue is arbitrable.

7 So the cases involving class arbitration and the
8 like that you just heard about, those are cases where the --
9 there's a serious question of whether the dispute is
14:52:59 10 arbitrable. There's no dispute here that Mr. Pennel's
11 appeal and his discipline are subject to arbitration under
12 the collective bargaining agreement, and that proceeding is
13 ongoing.

14 THE COURT: When did it commence?

14:53:16 15 MR. MASH: It commenced when they filed the notice
16 of appeal.

17 THE COURT: Which was --

18 MR. NASH: I can --

19 THE COURT: November 8.

14:53:28 20 MR. NASH: November 11.

21 THE COURT: I recognize that the process is
22 designed to be somewhat expeditious, but November 11 -- here
23 we are November 30. We're talking about a very short window
24 of time, a very short window of time. So it's not as if --

14:53:45 25 MR. NASH: Your Honor, that's the point of the

1 process. The hearing is scheduled -- it is supposed to be a
2 very short period of time. It is not just that they
3 thoroughly commenced the arbitration. They've submitted --
4 we already have a dispute over their discovery request that
14:54:00 5 should be submitted to the arbitrator, not to you, frankly,
6 with all due respect. You can't come into federal court
7 because you're not happy with the way the arbitration is
8 going.

9 THE COURT: Wait a minute.

14:54:11 10 MR. NASH: This is in a short period of time. The
11 arbitration is scheduled to be next Tuesday.

12 THE COURT: With all due respect, have you
13 provided, in terms of, again, I recognize -- let me back up.

14 I recognize the limitations that generally appear
14:54:25 15 to cases of this nature and the court's involvement in
16 disputes of this nature. I recognize fully those
17 limitations, but I am intrigued by the idea, given the
18 stakes here at issue, given -- again, repeating myself a
19 bit, given the fact that this individual may lose his
14:54:46 20 playing career as a consequence, I am intrigued by whether
21 or not, again, you can ignore the plain language of the
22 parties' agreement, which, with all due respect, sounds as
23 if you said, "We have basically come to some other agreement
24 that we will not follow the plain language of our
14:55:10 25 agreement."

1 And repeating myself a bit again, "and that we now
2 have allegedly some oral agreement, in essence, agreeing to
3 not follow the plain language of your arbitration
4 provision."

14:55:26 5 Now, if that's not something for the federal court
6 to get involved in, then, again, I may be mistaken. I am
7 going to have to review some of the case law, but that
8 intrigues me as to how and why you can go about doing that.

9 And I am -- candidly, I'm going to ask directly.
14:55:41 10 Have you shared with the plaintiff all the specifics about
11 the modification that has supposedly been agreed to, the
12 writings, the memoranda, the agreement of the union, we're
13 going to agree not to follow that provision, has that all
14 been shared with the plaintiff? Yes or no?

14:56:00 15 MR. NASH: Well, Your Honor, I don't agree with
16 the premise that there's a modification. Again --

17 THE COURT: I am sorry. I thought I just heard
18 that.

19 MR. NASH: I'm sorry, Your Honor. I don't agree,
14:56:12 20 and what I was trying to explain earlier is if we were in
21 the proper forum, that is, if the arbitration proceeds as it
22 should, we would be arguing about this to the arbitrator,
23 the points that you're --

24 THE COURT: Sir, are there three to five as the
14:56:29 25 provision provides?

1 MR. NASH: The provision provides -- yes, there
2 are, to make sure that there are sufficient arbitrators.

3 THE COURT: No, no. Is there three to five as the
4 plain language provides? Unless I missed something, and
14:56:47 5 there's a court reporter here, I will go back and read it, I
6 thought the position of the parties was or that the position
7 of the defendants was, "Well, no, we didn't comply with that
8 provision, because we reached a modification with the union
9 that it wouldn't be necessary to have the three to five
14:57:07 10 because there are so few of these hearings."

11 Am I mistaken?

12 MR. NASH: That's correct, Your Honor.

13 THE COURT: So back to my original point -- excuse
14 me. Excuse me. Back to my point.

14:57:19 15 Did you provide to the plaintiff all of the
16 pertinent documents verifying this agreement between
17 management and the union related to this provision? Yes or
18 no?

19 MR. NASH: Your Honor, we have provided them with
14:57:38 20 -- I can't speak to every document that's been provided in
21 response to their discovery request.

22 THE COURT: Well, Counsel, it sounds like we need
23 a hearing on this issue, because, I'm sorry, with all due
24 respect, that's kind of the basic thing that you would
14:57:54 25 provide informally.

1 MR. GREENSPAN: Your Honor, this is David
2 Greenspan for the NFLPA. If I could just say a few things.

3 Your Honor, another provision of the policy
4 specifically states that, and on page 27, "In presenting an
14:58:18 5 appeal under this policy, a player is not entitled to
6 production of or access to records, reports or other
7 information concerning other players or the policy's
8 bargaining history."

9 And so to the extent that this sort of discovery
14:58:33 10 that plaintiff has asked for and Your Honor is inquiring has
11 not been provided is because the policy specifically
12 prohibits it. Again, the NFLCA agrees with the NFL insofar
13 as to the extent that there are issues, the issues that are
14 intriguing to Your Honor, we understand why to the extent
14:58:55 15 that there are issues about discovery and what should and
16 should not be provided, they are for the arbitrator, a
17 neutral arbitrator, not affiliated with either the union or
18 the NFL or the Management Council, to hear it in the first
19 place.

14:59:12 20 As you will see in the NFL position paper, not
21 only is there a pending arbitration about Mr. Pennel's
22 discipline, the policy specifically provides for another
23 vehicle of arbitration by which a player who has a dispute
24 under the policy, which would encompass the dispute about
14:59:33 25 the numbers -- number of arbitrators, the existence of a

1 notice arbitrator, that is supposed to be brought to the
2 union, as well.

3 Mr. Pennel never did that. We learned about this
4 dispute at 4:00 yesterday when I was sent the complaint in
14:59:48 5 this case. None of those procedures were followed. I
6 understand that Your Honor is interested in the evidentiary
7 hearing. I don't think there should be one. Even if there
8 is one, it should be after the arbitration proceedings are
9 permitted to proceed.

15:00:07 10 With that said, as I was sitting here, Your Honor,
11 I am wondering what evidence would be presented? Well, I am
12 sure the plaintiff would be interested in evidence of his
13 modification. As they call it, what's the history here.
14 But that evidence is specifically barred by the collectively
15:00:24 15 bargaining policy.

16 I could imagine that the plaintiff will be
17 interested in testimony from Arbitrator Wong. Is he really
18 the notice arbitrator? Does he really have a role in
19 scheduling the arbitrations as the NFLCA and the NFL have
15:00:42 20 asserted? There is a body of case law that arbitrators
21 cannot be subject to that type of discovery.

22 So I'm not sure what sort of evidentiary hearing
23 there could be, even at an appropriate time that itself be
24 appropriate.

15:00:56 25 What we would urge Your Honor to do, and I very

1 much understand that for purposes of today's call, Your
2 Honor did not want to spend a lot of time on our arguments,
3 about the nature of their request for relief. I understand
4 that Your Honor did not want to spend a lot of time on our
15:01:11 5 arguments about the prematurity of their filing, that
6 they're in violation of the FAA and the LMRA, but these are
7 pure legal matters that we believe can be decided on a
8 motion to dismiss.

9 We would urge the court to entertain those
15:01:29 10 arguments prior to holding an evidentiary hearing.

11 We think that the proper course is, as the NFL
12 said, allow the arbitration process to play out. There is a
13 mechanism at the end of the arbitration process. Again,
14 this is extraordinary relief that plaintiff would seek, but
15:01:51 15 they could come to Your Honor then.

16 But if Your Honor has decided that they're not
17 going to allow the arbitration process to play out, we would
18 urge Your Honor to consider our legal arguments first before
19 holding an evidentiary hearing that is necessarily going to
15:02:06 20 entertain the presentation of evidence that is specifically
21 prohibited by the CPA and by arbitration.

22 THE COURT: Well, we're going to do the following,
23 sir, with all due respect. What I would strongly suggest is
24 the parties reach some agreement regarding the continuance
15:02:19 25 of the arbitration hearing that's scheduled on Tuesday.

1 That's what I strongly suggest you do.

2 Because, otherwise, we're going to have a hearing
3 on Monday. I have a jury trial starting on Tuesday. I will
4 be picking a jury on Tuesday.

15:02:30 5 And I will be busy preparing for a criminal trial
6 that's likely to take a week. I don't know how long it's
7 going to be. It's somewhat complex.

8 So if need be, absent some agreement to continue
9 this arbitration hearing scheduled for Tuesday, to allow me
15:02:47 10 a full opportunity to hear arguments, and maybe something
11 can be decided on the briefs. It may not. So, otherwise,
12 we will have some sort of hearing on Monday so that I can
13 have as much information as possible, decide the issues in
14 fairness to the plaintiff and the defendants, as well. The
15:03:05 15 stakes for the plaintiff are extremely high.

16 And as to the last set of arguments, Counsel, I
17 guess I am a bit surprised by the argument that you have an
18 agreement that says that these are the terms of the
19 agreement. They're valid and they're binding, but we can
15:03:22 20 modify the agreement and we don't have to disclose the
21 modification to anyone essentially.

22 That argument strikes me -- if that's the argument
23 you're relying on, then that's something that cries out for
24 some sort of hearing. Again, I guess my head is spinning
15:03:37 25 that you can enter into an agreement and make a modification

1 and then not disclose it to anyone. I mean, the plaintiff
2 is subject to the terms of this agreement. And if, in fact,
3 you've reached some modification with the union and then to
4 say to the plaintiff, who is subject to the arbitration, is
15:03:53 5 not entitled to know about the modifications that we've
6 reached and the details of same, strikes me as almost a lack
7 of fundamental fairness, and I just quite frankly don't
8 understand that argument.

9 So you can if you would like to confer and decide
15:04:10 10 whether or not you wish to agree to some stay of this or
11 modification of the arbitration date for 30 days. That
12 would be my suggestion.

13 And I can conduct my criminal trial and get that
14 matter out of the way, clear the decks. And we have a
15:04:25 15 holiday season. It's a difficult time for all involved, but
16 that's my suggestion.

17 Otherwise, I will take the matter -- we will take
18 up the matter for Monday on a hearing and I am going allow
19 the plaintiff potentially some limited discovery. I think
15:04:39 20 they're entitled to it, and at least that's my current
21 thinking absent some agreement between the parties. I
22 strongly suggest you reach some accomodation in that regard
23 so that the matter can get all the attention it deserves and
24 everyone can be fully heard, and I can have the benefit of
15:04:56 25 everyone's argument and be better prepared than I have been

1 today.

2 Counsel for the plaintiff, is that acceptable, or
3 I'm not sure what your thoughts are?

4 MR. ZASHIN: No, Your Honor, it is. We would
15:05:07 5 agree with the 30-day period to stay this matter.

6 The only question is absent that agreement, there
7 are filings that are actually due today to an unknown
8 arbitrator, as far as we're concerned, and that does cause
9 us concern. So we would ask that in the absence of an
15:05:30 10 agreement that at least we could -- you would agree that
11 until Monday, if there is no agreement, that this -- that
12 our submissions would not be due because we don't know who
13 to give them to.

14 THE COURT: That's interesting, as well, because I
15:05:46 15 thought I just heard counsel for the defendant name a
16 specific arbitrator who's going to be hearing the case,
17 Arbitrator Carter.

18 So that just also is intriguing.

19 MR. GREENSPAN: Your Honor, this is Dave Greenspan
15:06:01 20 for the NFLCA. I believe in an E-mail which is attached to
21 the complaint, the NFL Management Council specifically
22 informs Mr. Zashin that it will be Arbitrator Carter. It
23 was Exhibit B to the complaint filed.

24 MR. ZASHIN: That's what you have asserted. The
15:06:18 25 problem that we have is that it hasn't been done in

1 accordance with the policy and, therefore, that is the
2 ultimate underlying issue in this case, which is, there's
3 supposed to be three. So, therefore, our position is that
4 submitting anything today to Arbitrator Carter is not in
15:06:36 5 accord with the policy, because there's the lacking
6 arbitrator selection.

7 THE COURT: I am sorry to interpret. Do this.
8 Here's what I suggest you do.

9 I suggest you meet and confer, agree to a
15:06:47 10 continued date for the arbitration, so that -- and also
11 discuss a process for there to be papers filed, motion to
12 dismiss formally, and then I can decide whether or not we
13 need an evidentiary hearing once I have all of the filings
14 of the parties, have a full set of briefs, and then I can
15:07:06 15 understand or fully understand all the issues in the case.

16 That is the better way of proceeding in my view,
17 and continuing the arbitration hearing until such time as
18 this issue can be sorted out.

19 My suspicion is that this is not an issue that's
15:07:23 20 going to go away and it may arise again in the future. So
21 it might be to the benefit of all to get it cleared up here
22 and then you can go off to the circuit or however you would
23 like to proceed, but that's my suggestion given the press of
24 time and the business. I am not continuing my criminal
15:07:38 25 trial. I cannot.

1 So the ultimate -- in essence, I don't want to be
2 heavy-handed. It sounds a bit like I am doing just that.
3 But my suggestion is you agree to continue the arbitration
4 hearing.

15:07:53 5 Otherwise, I will see you all on Monday morning at
6 9:00, and we will have some sort of hearing, and then I will
7 decide whether or not to grant the TRO and that is what I
8 would be dealing with only, is a temporary restraining
9 order, to enjoin the arbitration hearing going forward on
15:08:10 10 Tuesday. And then we can go ahead and decide the issues in
11 full, but that's my suggestion to you all.

12 Again, if you would like to discuss it among
13 yourselves, or if you would like to agree while we are on
14 the phone, that would be helpful. Otherwise, I'm going to
15:08:26 15 do -- I think I have a right to do it. I will do it Monday
16 morning at 9:00, and I will issue or decide whether or not
17 to issue any kind of order whatsoever on Monday, and, again,
18 that's going have implications for the arbitration
19 proceeding, et cetera.

15:08:41 20 So anyway, that's where we're at.

21 Counsel for the defendants, do you have any
22 thoughts?

23 MR. GREENSPAN: Your Honor, this is David
24 Greenspan for the NFLPA. We hear you loud and clear. I
15:08:57 25 need to confer with my clients, and we will get back

1 together with the other parties. We hear your message.

2 THE COURT: I think it would behoove all the
3 parties so that the matter can be fully and fairly heard in
4 the outcome. Again, the outcome is not predetermined in any
15:09:14 5 -- I am just trying to get a grasps of the issues and try to
6 decide them fairly to all sides.

7 So time. I need more time to do that, and I need
8 the benefit of the briefing, not just this argument here.

9 On behalf of the NFL, please?

15:09:27 10 MR. NASH: Yes, Your Honor, we certainly hear your
11 concerns and suggestions. Like the Players Association, we
12 would have to go back and confer with the client. As I said
13 earlier, you know, there is -- there is a broader issue here
14 of our collective bargaining agreement and so -- and the
15:09:47 15 importance of it being followed.

16 And as I also said, Mr. Pennel is currently free
17 to play, and he will remain free to play until there is an
18 arbitration award issued or some other order from the court.

19 THE COURT: I understand that. That's -- you made
15:10:07 20 that perfectly clear. So I would ask you to confer with
21 your clients. Then we will have -- perhaps we should
22 schedule another conference here. I have -- if you can
23 reach an agreement, then I will give you my law clerk's
24 E-mail address, and you can reach out to her and let her
15:10:27 25 know.

1 What I would be looking for, to be optimistic,
2 would be agreed dates for submissions to the court, motion
3 to dismiss, and then a reply and also use an agreed date for
4 the continue situation of the arbitration, so that, again,
15:10:45 5 so there's -- we have both moving forward.

6 Her E-mail is Cara, C-A-R-A, underscore, Staley,
7 S-T-A-L-E-Y, at O-H-N-D, dot U.S. Courts, plural, dot gov.

8 And you can reach out to her and advise her if
9 you've reached some agreement, let her know. If you have
15:11:24 10 not or cannot, then I will have her reach out to you in
11 terms of a date and time for us to discuss a formal hearing
12 in the matter and try to put in place some parameters and
13 whether or not any discovery will be permitted, what have
14 you. I don't know exactly what the boundaries will be, the
15:11:42 15 parameters will be, what have you, until such time as I get
16 a closer look into the papers here.

17 And so if you could do that. Like I said, I am
18 busy preparing for this criminal trial. We'll do the best
19 you can, and hopefully, you will be able to reach some
15:11:57 20 agreement as it relates to a brief continuance of the
21 matter.

22 And, again, if there's any, issues, let me know.

23 Anything else before we terminate and end the
24 conference, please?

15:12:07 25 On behalf of the plaintiff?

1 MR. ZASHIN: No, Your Honor.

2 THE COURT: Gentlemen, on behalf of the
3 defendants?

4 MR. GREENSPAN: No, Your Honor.

15:12:15 5 MR. NASH: No, Your Honor.

6 THE COURT: On behalf of the defendants, thank you
7 for being available on such short notice. We appreciate it.
8 And we will hopefully hear from you in the short order, and
9 then we can decide how we're going to proceed with this
15:12:29 10 difficult dispute.

11 Thank you very much.

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled
matter.

s/Lori A. Callahan
Lori Ann Callahan, RMR-CRR
U.S. District Court, Suite 568
2 South Main Street
Akron, Ohio 44308
(330) 252-6022